IN THE MICHIGAN SUPREME COURT
APPEAL FROM THE COURT OF APPEALS
M. J. KELLY, P.J., and STEPHENS and O'BRIEN, JJ.

ESTATE OF MARY ANN HEGADORN, by
RALPH HEGADORN, Personal Representative
Plaintiff-Appellant,

v

DEPARTMENT OF HUMAN SERVICES
DIRECTOR,
Defendant-Appellee
_____/

SC: 156132
COA: 329508
Livingston CC: 2014-028394-AA

The appeal involves a ruling that a provision of the Constitution, a statute, rule or regulation, or other State governmental action is invalid.

ESTATE OF DOROTHY LOLLAR, by DEBORAH
D TRIM, Personal Representative
Plaintiff-Appellant,

v

DEPARTMENT OF HUMAN SERVICES
DIRECTOR,
Defendant-Appellee
_____/

SC:156133
COA: 329511
LivingstonCC: 2014-028395-AA

ROSELYN FORD,
Plaintiff-Appellant,

v

DEPARTMENT OF HEALTH AND HUMAN SERVICES
DIRECTOR,
Defendant-Appellee
_____/

SC:156134
COA: 331242
Washtenaw CC: 15-000488-AA

BRIEF ON APPEAL - APPELLANTS ESTATE OF MARY ANN HEGADORN, ROSELYN FORD, and THE ESTATE OF DOROTHY LOLLAR

ORAL ARGUMENT REQUESTED

_____

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STATEMENT OF BASIS FOR JURISDICTION

This Court has jurisdiction over this matter pursuant to MCR 7.303(B)(1). By Order dated March 7, 2018, this Court granted Appellants' Application for Leave to Appeal the Michigan Court of Appeals' Opinion issued on June 1, 2017, which was approved for publication on July 27, 2017.

STATEMENT OF QUESTIONS PRESENTED

I. Does the statutory term "individual" as used in 42 USC 1396p(d)(3)(B) mean "the individual or the individual's spouse".

The Administrative Law Judge in effect answered this question yes.
Circuit court's answer: No
Court of Appeal's answer: Yes
Appellant's answer: No
Appellee's answer: Yes

II. Whether the Court of Appeals clearly erred in holding that the trust assets of Ford's spouse and decedent Lollar's and Hegadorn's spouses are "countable assets" for purposes of Medicaid eligibility.

Administrative Law Judge's answer: No
Circuit court's answer: Yes
Court of Appeal's answer: No
Appellant's answer: Yes
Appellee's answer: No

III. Whether the Department of Health and Human Services could base its decision on the retroactive application of a department policy adopted more than 45 days after the plaintiffs' applications were filed

Circuit court's answer: No
Court of Appeal's answer: Yes
Appellant's answer: No
Appellee's answer: Yes

INTRODUCTION

This is a Medicaid eligibility case under Title XIX of the Social Security Act, Grants to States for Medical Assistance Programs. Title XIX is a federal aid program that allows participating states, through the use of federal funds, to furnish medical assistance.

OVERVIEW

A. Medicaid Qualification.

Congress established the Medicaid program in 1965 to provide federal and state funding of medical care for individuals who cannot afford to cover their own medical costs. See Social Security Amendments of 1965, Title XIX, Grants to States for Medical Assistance Programs, Pub L No 89–97, 79 Stat. 286, 343–52 (codified as amended at 42 USC 1396–1396w–5). The program is administered by the Secretary of Health and Human Services (HHS or the federal agency), who in turn exercises that authority through the Centers for Medicare and Medicaid Services (CMS). To implement the program, each participating State develops a plan containing reasonable standards for determining eligibility for and the extent of medical assistance within boundaries set by the Medicaid statute[s] and the Secretary of HHS. See *Hughes v McCarthy*, 734 F3d 473, 475 (CA 6 2013). Under the terminology used for this Medicaid program, a spouse residing in a nursing home is referred to as the "institutionalized spouse," and the person who is living outside of the nursing home and is married to the "institutionalized spouse," is referred to as the "community spouse". See 42 USC 1396r-5(h)(1)(A) and 42 USC 1396r-5(h)(1)(B).

In 1988, Congress passed the Medicare Catastrophic Coverage Act ("MCCA"), Pub L No 100–360, 102 Stat. 683, which includes a set of intricate and interlocking requirements with which

States must comply in allocating a couple's income and resources. The MCCA allows the community spouse to retain, without additional restrictions, that portion of the couple's "resources" which is referred to as the Community Spouse Resource Allowance ("CSRA")[1], because the CSRA is deemed to be unavailable to the institutionalized spouse when calculating Medicaid eligibility, and therefore that amount of "countable resources" does not affect the institutionalized spouse's Medicaid eligibility. See 42 USC 1396r–5(c)(2) & (f)(2). Also, a community spouse's income is not considered available to the institutionalized spouse for eligibility purposes, except in limited circumstances. See 42 USC 1396r–5(b). Further, "after the month in which an institutionalized spouse is determined to be eligible for benefits ..., no resources of the community spouse shall be deemed available to the institutionalized spouse." 42 USC 1396r–5(c)(4).

After calculation of the CSRA, if the couple still has countable resources in excess of the amount permitted for that individual under the Medicaid system, the couple can "spend down" their additional remaining countable resources in order to reduce their total remaining countable resources to a level that will allow the institutionalized spouse to qualify. But, the couple is not permitted to simply "give away" their "excess" countable resources in a manner not specifically permitted by the Medicaid statutory system, because if they do that, a "divestment penalty" could be imposed on the institutionalized spouse. That is, "if an institutionalized individual or the spouse of such an individual ... disposes of assets for less than fair market value on or after the look-back date" (which, as relevant here, is defined as sixty months prior to the first date on which the institutionalized spouse applies for Medicaid assistance), "the individual is ineligible for medical assistance for

[1] Referred to in Michigan as the "protected spousal amount"; see Michigan Department of Health and Human Services, Bridges Eligibility Manual ("BEM") 402, See Appx 343a.

services" (such as coverage for nursing home costs) for the number of months that the assets would have covered the average monthly cost of such services. See 42 USC 1396p(c)(1) and the sub-divisions thereunder. However, these transfer penalties do not apply to certain transfers which are permitted under the federal Medicaid system to accomplish that reduction. For example, a married couple could:

- Spend the countable resources on goods and services the nursing home spouse or community spouse needs, provided that the price/fee paid is at fair market value. See BEM 405, Appx 362a.
- Convert the countable resources to excluded resources by purchasing a home, car, funeral plan, burial space, and certain life insurance policies. See BEM 405, Appx 365a-366a.
- Loan countable resources to someone so long as the loan is repaid in equal installments over the Medicaid applicant's or the community spouse's lifetime. See BEM 400 Appx 295a-296a.
- File a petition in probate court requesting that the court increase the Community Spouse Resource Allowance so that the community spouse can keep more or all of the countable resources. See BEM 402, Appx 352a.
- Give countable resources to a blind or disabled child, regardless of the child's age. See BEM 405, Appx 365a.
- Transfer countable resources to a trust established solely for the benefit of a blind or disabled child. See BEM 405, Appx 365a.
- Transfer countable resources to a trust established solely for the benefit of a disabled person under the age of 65 (even if the person is a complete stranger). See BEM 405, Appx 366a.
- Convert countable resources to an income stream for the community spouse by obtaining a Medicaid compliant annuity, that does not extend beyond the community spouse's life expectancy. See BEM 401, Appx 329a.
- Transfer countable resources to a trust solely for the benefit ("SBO") of the community spouse, provided that the trust provides for distributions of the principal and income of the trust to the community spouse over a period time which does not extend beyond the community spouse's life expectancy. See BEM 405, Appx 365a, 367a-368a.

Of particular relevance here: "An individual shall not be ineligible for medical assistance by reason of paragraph (1) to the extent that ... (B) the assets . . . (i) were transferred to the individual's spouse

or to another for the sole benefit of the individual's spouse[.]" See 42 USC 1396p(c)(2)(B)(I). Similarly, a separate provision states that an annuity is not treated as an available resource for purposes of Medicaid eligibility if the annuity meets certain requirements. *See* 42 USC 1396p(c)(1)(G). Congress later passed the Deficit Reduction Act of 2005 (DRA), Pub.L. No. 109–171, 120 Stat. 4, 62–64, as amended by the Tax Relief and Health Care Act of 2006, Pub.L. No. 109–432, 120 Stat. 2922, 2998, which added provisions to 42 USC 1396p(c)(1) concerning whether the purchase of certain annuities should be deemed transfers for less than fair market value. See 42 USC 1396p(c)(1)(F), (G). Congress did not, however, amend 42 USC 1396p(c)(2)(B) with the DRA's enactment, which pertains to transfers to sole benefit trusts.

As outlined in more detail under part II of this brief, the term "assets", with respect to an individual, includes all income and ***resources*** of the individual and of the individual's spouse. 42 USC 1396p(h)(1). However, when administering the Medicaid plan, the state may consider ("count") **only** such income and assets as are "available" to the applicant, as determined by the federal rules. *Geston v Olson*, 857 FSupp2d 863, 874 (DND 2012); and *Wisconsin Dept of Health and Family Services v. Blumer,* 534 US 473, at 495; 122 Sct 962 (2002). That is, in order for a "resource" to be countable, it must be "available". **As a general rule, a property right of any kind is <u>not a resource</u> if the individual (or spouse) does not have "the legal right, authority, or power to liquidate" that property right.** See 20 CFR 416.1201(a)(1); (emphasis added). In the case of property held in a trust, this rule is modified as to the "individual" Medicaid **applicant** by 42 USC 1396p(d)(3)(B), but not as to the "individual's spouse," because the "individual's spouse" is not included under that rule (this issue is discussed in detail in Part III of this brief).

The determination of the amount of countable resources for an initial eligibility determination

is made "as of the time of application for benefits". 42 USC 1396r–5(c)(2).

B. "Solely for the Benefit of" Trusts.

As outlined above, there are a number of options available under federal Medicaid statutory law and regulations, as well as Michigan's Medicaid policy, for the married couple to "spend down" assets to allow the institutionalized spouse to qualify for Medicaid assistance. One of these options is to transfer the assets to a trust which qualifies as a the trust solely for the benefit of ("SBO") the community spouse under the federal requirements, because such a transfer does not subject the couple to a divestment penalty. See 42 USC 1396p(c)(2)(B).[2] Transfers to such a trust may be made by the individual applicant or the individual's spouse. *Id.*

For nearly twenty years, the Department of Health and Human Service's policy has considered property held under properly drafted and structured SBO Trusts for community spouses as non-countable for purposes of determining the Medicaid eligibility of the nursing home spouses. The memo issued by the Department's Office of Legal Services/Trust and Annuities Unit on March 26, 2014 which analyzes the Herbert Ford Irrevocable Trust, is an example of the analysis used by the Department when evaluating Sole Benefit Trusts of this type before August of 2014. See Appx 226a. As stated in that memo, some of the terms of the trust which allow the trust to qualify as a Solely for the Benefit of Trust ("Sole Benefit Trust" as used in this brief) include the following:

- The community spouse (Herbert Ford) is the only person entitled to distributions from the trust,
- Trust distributions must be made "on an actuarially sound basis" per the Department's life expectancy table,

[2] The corresponding Michigan Bridges Eligibility Manual item is BEM 405, pp 9, 11-12, See Appx 365a, 367a-368a.

- The trust is irrevocable,
- The trust does not allow distributions to be made during the month of application,[3] and
- "There is no condition under which the principal or income could be paid to or on behalf of Roselyn" (the institutionalized spouse).

Therefore, as stated in that memo, "the trust principal and income (none at this time) are non-countable for purposes of determining Roselyn's eligibility". See Appx 226a.

However, after the applications had been filed in all of these cases, and without any advance public notice, Terrence M. Beurer, director for the Department's Field Operations Administration, issued a memorandum on August 20, 2014 stating that "all SBO trust assets are deemed countable pursuant to BEM 401, page 11."See Appx 228a. At the time of the Department's announcement, there had been no change in the federal law or regulations, or the written Department's policies contained in the BEMs governing Medicaid applications. What changed was only the Department's longstanding interpretation of the BEM 401 in relation to spousal SBO trusts. At that point, the Department decided to interpret the term "person" as used in BEM 401, page 11 to include not only the Medicaid applicant but also the Medicaid applicant's spouse. See Appx 226a. Note that the corresponding term as used in the federal statute is "individual".[4] As a result, SBO trust resources, which had been treated as noncountable assets when such an SBO trust did not permit distributions from the trust to the community spouse beneficiary at the time the Medicaid

[3] Even if the trust permitted a distribution to the community spouse during the month of application, that fact alone would not cause the assets of the trust to be a countable resource to the community spouse, because the Department's BEM 401, page 13 states that distributions from a trust such as this are counted as income (in the month received), and under the federal statutes, the community spouse's income is not countable to the institutionalized spouse.

[4] The federal statute is 42 USC 1396p(d)(3)(B) which is discussed in detail in part III of this brief.

application was filed (and also when there was no condition under which the principal or income of the trust could be paid to or on behalf of the Medicaid applicant), were now treated as countable resources when the Department evaluated an applicant's eligibility for Medicaid. The Department's justification for this change is the Department's claim that the term "person" as used in BEM 401 means any generic "person". Ms. Schrauben, who serves as the Departmental specialist, Office of Legal Services, for the Department, testified in all three cases that prior to August 13, 2014, that the assets of a Sole Benefit Trust such as these were non-countable at the time of application. See Appx 94a, 58a, 59a, and 156a.

C. Processing Medicaid Applications.

Federal Medicaid law requires that applications be processed with "reasonable promptness." See 42 USC 1396a(a)(8) (requiring state plans to "provide that all individuals wishing to make application for medical assistance under the plan shall have opportunity to do so, and that such assistance shall be furnished with reasonable promptness to all eligible individuals"). Under the federal rules applicable to the Medicaid Act, applications must be processed and eligibility determined within 45 days. 42 CFR 435.911(a)(2). Thus, as a matter of federal law, Medicaid administrators are required to make eligibility determinations within· 45 days of receiving an application. See 42 CFR 435.911(b). In other words, applications for Medicaid are required to be processed "without delay." 42 CFR 435.906. As required by federal law and regulations governing Medicaid applications, the Department previously adopted Bridges Administrative Manual ("BAM") item 115, which at page 15 states that the Department had 45 days to render a decision, which in the Ford case was until March 17, 2014. See Appx 257a. However, in the Ford case, no qualification

determination was made until September 29, 2014.See Appx 164a

STATEMENT OF FACTS AND PROCEEDINGS

These cases involve three married individuals who applied for Medical Assistance (Medicaid) to assist with the payment of nursing home costs under the federal Medicaid system commonly referred to as "Title XIX": Dorothy Lollar, Mary Ann Hegadorn, and Roselyn Ford. Title XIX is a federal aid program that allows participating states, through the use of federal funds, to furnish medical assistance. The Department[5] denied all three individuals' applications for Medicaid benefits because the Department counted as "available," assets that were placed into a trust "Solely for the Benefit of" the Medicaid applicant's spouse, even though no distributions from each trust could be made to the spouse beneficiary at the time the applications were filed (and no distributions could ever be made from the trust to or for the benefit of the Medicaid applicant). These cases were consolidated before the Court of Appeals. The facts recited by the *Hegadorn* et al opinion are largely undisputed.

Lollar Background

Dorothy Lollar, began receiving care at the MediLodge Nursing home in Howell, Michigan on or about May 1, 2014. See Appx 116a. She was married to Dallas Lollar. The protected spousal amount calculated by the Department for Mr. Lollar was $31,267.31. See Appx 117a. Although the Medicaid statutes permitted the community spouse to retain up $117,240 of countable assets for a

[5]In this Application, the Defendant-Appellee, Maura D. Corrigan, Director of the Michigan Department of Health and Human Services, is referred to as the "Department".

2014 Medicaid application such as this one, Mr. Lollar's protected spousal amount was $85,000 **less** than that maximum because the total value of the Lollar's combined countable assets as of May 1, 2014, was only $62,534.62 as determined by the Department. See Appx 117a. The Medicaid application for the Appellant, **Mrs**. Dorothy Lollar, was submitted on July 31, 2014, and a "Retroactive" Medicaid application for June 2014 was submitted at that time as well. Prior to the submission of this application, **Mr**. Dallas Lollar established the *Dallas H. Lollar Irrevocable Trust* on June 19, 2014 [See Appx 216a-225a], which qualifies as a "Sole Benefit Trust" or "Solely for the Benefit Of" (SBO) Trust for **Mr**. Dallas Lollar, because he is the "sole beneficiary" of that trust and the assets in the Trust must be distributed only to him and within his lifetime. See Appx 116a[6] The Trust specifically provides that there was no circumstance that permitted any trust payment to be disbursed to **Mr**. Lollar while **Mrs**. Lollar's application and retroactive application were being processed. See Appx 218a. Regarding payments from the Trust, paragraph 2.2 provides:

> 2.2 *Distribution of resources*. During each fiscal year of the Trust, Trustee shall from time to time during the fiscal year pay or distribute to me, or for my sole benefit, during my lifetime such part or all of the net income and principal ("Resources") of the Trust as Trustee determines is necessary to distribute the resources in an actuarially sound basis; provided, however, during the first fiscal year of the Trust, the distribution shall not be made to me until after such time as Medicaid eligibility bas been determined for my spouse, but in no event later than May 31, 2015. In determining an actuarially sound basis for distribution, Trustee shall use the life expectancy table attached as Exhibit A, to determine the appropriate minimum portion of Resources to be distributed in any fiscal year. During my lifetime, no Resources of the Trust can be used for anyone other than me, except for Trustee fees. Notwithstanding anything contained herein to the contrary, Trustee shall distribute the Resources of the Trust at a rate that is calculated to use up all of the Resources during my lifetime. The Resources of the Trust shall be valued on the first

[6] At one point in the ALJ decision, the ALJ mistakenly refers to Mr. Lollar's trust as a "revocable trust". However, the ALJ later correctly refers to that trust as an "irrevocable trust" (see Appx 122a).

> day of June 1st of each fiscal year of the Trust, except that in the first fiscal year, the Resources of the Trust shall be valued as of the date of their contribution to the Trust.

See Appx 218a.

The value of assets held under the Sole Benefit Trust when the application was filed on July 31, 2014 (and also June 31, 2014), amounted to $19,998.48. See Appx 255a. When the application was processed, the Department determined the total value of countable assets held by either Mr. or Mrs. Lollar as of the date of the application was filed came to $35,822.29, including the value of the assets held under the Sole Benefit Trust as of that time ($19,998.48).[7] In other words, the combined total of their **countable assets** would come to $15,823.81 if the assets held under the Sole Benefit Trust are not counted ($35,822.29 - $19,998.48 = $15,823.81), which is much less than the protected spousal amount calculated by the Department for Mr. Lollar of $31,267.31. See Appx 81a.

The Department determined that Mrs. Dorothy Lollar did not qualify for Medical Assistance, because it counted the assets held under the Sole Benefit Trust based on its "new interpretation" of the provisions of BEM 401. See Appx 76a and 94a.

According to the testimony at the ALJ hearing of one of the Department's witnesses, Patti Holihan (who was the worker assigned to Mrs. Lollars application), "a decision [by the Department] was made that the assets contained in the sole benefit trust was [sic] deemed to be countable," although the written wording of BEM 401 had not changed. See Appx 85a. That is, there had been no change in the written policy (BEM 401) from June 2014 until August 2014. See Appx 86a. Patti

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[7] Id. This couple's total combined **countable** assets value as of the date the Medicaid application was filed is less than their combined total of **countable** assets as of May 1, 2014, due to various expenditures and/or conversions that occurred after May 1, 2014, such as the conversion of countable life insurance to non-countable prepaid funeral contracts. See pages 232a- 252a. Those expenditures and/or conversions are not at issue in this case.

Holihan further testified that Mr. Lollar had established the Sole Benefit Trust for his benefit, and to her knowledge, **Mrs**. Dorothy Lollar (the Appellee herein) was not to receive any of the money contained in that Trust, and the monies of the Trust were not to be distributed to anybody else but Mr. Lollar. See Appx 86a-87a. Ms. Shrauben (the legal analyst assigned by the Department to evaluate this SBO trust) also acknowledged that none of the assets held under this irrevocable trust are payable to Dorothy Lollar, and that **Mr.** Lollar, **not Mrs. Lollar** is the beneficiary of the Trust, and **Mr. Lollar was not the Medicaid applicant.** See Appx 91a. Ms. Shrauben further testified that the interpretation of BEM 401 which she applied to Mr. Lollar's Sole Benefit Trust was not being used until mid-August 2014, starting August 13th, but Mrs Lollar's Medicaid application was filed on July 31, 2014. See Appx 93a. Ms. Shrauben further testified that there was no public notice given for this change in interpretation, and also "no written notice was given to department heads or other individuals, such as Ms. Holihan or Ms. Carroll, explaining the change in direction or the change of interpretation and the basis for doing so".See Appx 97a. Ms. Shrauben also acknowledged that the policy interpretation which had been used prior to August 13, 2014, was that the assets of a Sole Benefit Trust such as this were non-countable. See Appx 94a and 226a.

Hegadorn Background

Mary Ann Hegadorn, began receiving care at the MediLodge Nursing home in Howell, Michigan on or about December 20, 2013. See Appx 105a. She was married to Ralph Hegadorn. The protected spousal amount calculated by the Department for Mr. Hegadorn was $115,920, which is equal to the maximum permitted protected spousal amount. See Appx 106a. The Medicaid application for Mrs. Hegadorn was submitted on April 24, 2014. Prior to the submission of this

application, Mr. Hegadorn established the *Ralph D. Hegadorn Irrevocable Trust No. 1* on January 23, 2014, [See Appx 191a - 202a] which qualifies as a "Sole Benefit Trust" or "Solely for the Benefit Of" (SBO) Trust for Mr. Ralph D. Hegadorn, because he is the "sole beneficiary" of that trust and the assets in the Trust must be distributed only to him within his lifetime. See Appx 106a. The Trust specifically provides that the "Trustee shall distribute the Resources of the Trust at a rate that is calculated to use up all of the Resources during my lifetime,"[See Appx 204a] and includes a Distribution Schedule (at the end of the Trust) providing for monthly payments of $3,717 each. In addition, the Trust at paragraph 2.2 provides:

> 2.2 **Distribution of resources**. During each fiscal year of the Trust, Trustee shall from time to time during the fiscal year pay or distribute to me, or for my sole benefit, during my lifetime such part of all of the net income and principal ("Resources") of the Trust as Trustee determines is necessary in order to distribute the resources in an actuarially sound basis. In determining an actuarially sound basis for distribution, Trustee shall use the life expectancy table attached hereto as Exhibit 1, to determine the appropriate portion of Resources to be distributed in any fiscal year. During my lifetime, no Resources of the Trust can be used for anyone other than me. Notwithstanding anything contained herein to the contrary, Trustee shall distribute the Resources of the Trust at a rate that is calculated to use up all of the Resources during my lifetime. The Resources of the Trust shall be valued on the 1st day of January of each fiscal year of the Trust, except in the first fiscal year of the Resources of the Trust shall be valued as of the date of their contribution to the Trust.

See Appx 204a.

The value of assets held under the Sole Benefit Trust when the application was filed on April 30, 2014 amounted to $305,962.76. See Appx 12a and 256a. When the application was processed, the Department determined the total value of countable assets held by either Mr. or Mrs. Hegadorn as of the date of the application was filed came to $424,377.48, including the value of the assets held outside the Sole Benefit Trust of $118,414.72, and the value of the assets held under the Sole Benefit Trust as of that time of $305,962.76. See Appx 256a. If the value of assets held under the Sole

Benefit Trust on April 24, 2014, are excluded as non-countable, then Mrs. Hegadorn would qualify for Medical Assistance Medicaid benefits, because Mr. Hegadorn was allowed the protected spousal amount of $115,920.00 plus the $9,315.78, pursuant to a probate court protective order comes to a total of $125,235.78, which is less than the total of the countable assets held outside the Sole Benefit Trust.[8] See Appx 23a-24a and 256a

The Department determined that Mrs. Mary Ann Hegadorn did not qualify for Medical Assistance, because it also counted the assets held under the Sole Benefit Trust based on its "new interpretation" of the provisions of BEM 401. See Appx 59a.

According to the testimony at the ALJ hearing of one of the Department's witnesses, Patti Holihan (who was the worker assigned to Mrs. Hegadorn's application), concurred that the application of Mrs. Hegadorn was to be reviewed and adhered to pursuant to the Bridges Eligibility Manual in operation at that time. See Appx 34a. She further stated that she did not send the SBO trust in for evaluation by the legal department because she wasn't able to process it timely. See Appx 38a-39a. When queried as to why she failed to do so, her response was that she was doing the work of two people. See Appx 39a. She further acknowledged that she knew that the Medicaid regulations mandate that a determination of eligibility had to be completed within 45 days of receipt, but in the Hegadorn case it was not. See Appx 39a. Ms. Schrauben, who serves as the Departmental specialist, Office of Legal Services, for the Department of Human Services, identified herself as the sole evaluator of SBO trusts after "we started treating them as being countable," same being "probably August 13, 2014."See Appx 58a. When queried further, as to the countability of SBO

[8]Mr. Hegadorn was allowed an additional $9,315.78, pursuant to a probate court protective order, see Appx 23a-24a.

trusts prior to August 13, 2014, she stated "the evaluators in the trust and annuity unit were treating them as not countable."See Appx 58a. When asked if the trust had been submitted timely to the unit for evaluation, she acknowledges that it (SBO trust) would have been deemed non-countable.See Appx 59a.

Ford Background

Roselyn Ford, began receiving care at the Saline Evangelical Home in Saline, Michigan on or about December 5, 2013. See Appx 163a. She is married to Herbert Ford. The protected spousal amount calculated by the Department for Mr. Ford was $117,240. See Appx 165a. The Medicaid application for Mrs. Ford was submitted on January 30, 2014. Prior to the submission of this application, Mr. Ford established the *Herbert Ford Irrevocable Trust* on January 10, 2014 [Appx 216a - 225a], which qualifies as a "Sole Benefit Trust" or "Solely for the Benefit Of" (SBO) Trust for **Mr**. Herbert Ford, because he is the "sole beneficiary" of that trust and the assets in the Trust must be distributed only to him and within his lifetime. See Appx 226a-227a. Regarding payments from the Trust, paragraph 2.2 provides:

> 2.2 *Distribution of resources.* During each fiscal year of the Trust, Trustee shall from time to time during the fiscal year pay or distribute to me, or for my sole benefit, during my lifetime whatever part of the net income and principal (the Resources) of the Trust that Trustee determines is necessary to distribute the resources on an actuarially sound basis. However, during the first fiscal year of the Trust, the distribution shall be made to me after August 1, 2014, but before December 1, 2014. In determining an actuarially sound basis for distribution, Trustee shall use the life expectancy table attached to this Agreement as exhibit A, to determine the appropriate minimum portion of the Resources to be distributed in any fiscal year. During my lifetime, no Resources of the Trust may be used for anyone other than me, except for Trustee fees. Notwithstanding anything in this Agreement to the contrary. Trustee shall distribute the Resources of the Trust at a rate that is calculated to use up all of the Resources during my lifetime. The Resources of the Trust sha11 be valued on the first day of **July** of each fiscal year of the Trust, except that in the first

> fiscal year the Resources of the Trust shall be valued as of the date of their contribution to the Trust.

See Appx 218a.

On March 26, 2014, Diana Bibbs for the Department's Office of Legal Services - Trusts and Annuities Division issued a memo evaluating the Herbert Ford Irrevocable Trust. See Appx 226a-227a. That memo correctly determined at the only person entitled to distributions from the trust is Herbert (the "community spouse"), and further "There is no condition under which the principal or income could be paid to or on behalf of Roselyn" (the person who was the applicant). That memo then correctly concludes: "Thus, the trust principal and income (none at this time) are non-countable for purposes of determining Roselyn's eligibility."See Appx 226a.

Despite the legal requirements imposed by federal law and regulations governing Medicaid applications, the Department caseworker sat on the file without making a determination, even though all the required documentation was present for making a decision on Roselyn's Medicaid application by March 17, 2014 (45 days after the Application was filed). Indeed, the file was complete from the beginning, as the caseworker never requested additional information or documents. See Appx 147a-148a.

On August 29, 2014, as part of the evaluation of Roselyn's application, Mary Schrauben of the DHHS' Office of Legal Services/Trust and Annuities Unit reviewed the trust and issued a memorandum, stating that "the countable asset for Roselyn Ford is the value of all the countable net income and the countable assets in the principal of the trust." See Appx 229a-231a. Subsequently, on September 29, 2014, almost **nine months** after Roselyn's Medicaid application was filed, the Department issued a Health Care Determination Notice denying Roselyn's Medicaid application,

claiming that Roselyn was ineligible for Medicaid due to excess assets on the ground that the SBO trust assets in the Herbert Ford Irrevocable Trust were countable assets for determining Roselyn's Medicaid application. See Appx 165a.

The Lower Court Proceedings

Administrative Law Judge Hearing

In each case, the Appellants appealed the Department's determination. Hearings were held before Administrative Law Judge (ALJ) Landis Y. Lain was held with respect to Appellants Hegadorn and Lollar on November 5, 2014. ALJ Lain affirmed the Department's determination with respect to Hegadorn and Lollar. See Appx 105a-115a, and 116a-126a. A hearing before ALJ Alice C. Elkin was held with respect to Appellant Ford on March 19, 2015. ALJ Elkin reached the same conclusion as ALJ Lain. See Appx 163a-174a.

Circuit Court

In each case, the Appellants appealed the ALJs' decisions to the circuit court., Livingston Circuit Judge Michael P. Hatty reversed ALJ Lain's decisions to affirm the Department's denial of Appellants Hegadorn's and Lollar's applications. See Appx 175a and 176a. Washtenaw Circuit Judge Timothy P. Connors also reversed the ALJ's decision to affirm the Department's denial of Appellant Ford's application, relying on Judge Hatty's decision. See Appx 177a.

Court of Appeals

In each case, the Appellees appealed the Circuit Courts' decisions to the Court of Appeals. The Court of Appeals consolidated the three cases, and reversed the circuit court decisions and reinstated the administrative hearing decisions. See Appx 179a-190a.

Proceeding in this Court

On July 13, 2017, the Appellants filed an application for leave to appeal with this Court. This Court granted leave by Order dated March 7, 2018 and ordered the parties to "include among the issues to be briefed whether: (1) the Court of Appeals clearly erred in holding that the trust assets of the plaintiffs' spouses' and decedent Lollar's spouse are "countable assets" for purposes of Medicaid eligibility; and (2) the Department of Health and Human Services could base its decision on the retroactive application of a department policy adopted more than 45 days after the plaintiffs' applications were filed."

ARGUMENT

I. STANDARD OF REVIEW

This Court applies various standards of review to this case. First, this Court reviews questions of constitutional law de novo. *Elba Twp v Gratiot Co Drain Comm 'r,* 493 Mich 265, 277; 831 NW2d 204 (2013). Whether due process has been afforded is a constitutional issue that is reviewed de novo. *Id.*

Second, issues of statutory interpretation are also reviewed de novo. *State ex rel Gurganus v CVS Caremark Corp,* 496 Mich 45, 57; 852 NW2d 103 (2014).

Finally, pursuant to 1963 Const, art 6, § 28, the standard of review for a judicial or quasi-judicial administrative agency action is whether it is "'authorized by law'" and its factual findings are "'supported by competent, material and substantial evidence on the whole record.'" *Viculin v Dep't of Civil Serv,* 386 Mich 375, 384; 192 NW2d 449 (1971), quoting Const 1963, art 6, § 28; see also *Midland Cogeneration Venture Ltd Partnership v Naftaly,* 489 Mich 83, 97; 803 NW2d 674 (2011)

(holding that "the Michigan Constitution guarantees judicial review ... and this guarantee may not be jettisoned by statute"). However, there are no factual findings at issue in these cases.

II. THE COURT OF APPEALS CLEARLY ERRED WHEN IT DETERMINED THAT THE ASSETS HELD UNDER EACH SOLE BENEFIT TRUST WAS A COUNTABLE RESOURCE OF THE WIFE/MEDICAID APPLICANT.

A. The term "resource" is not a generic term, but rather a special term with a particular meaning under the medicaid statutes.

The central issue in this case is whether the assets held under a community spouse's Sole Benefit Trust may be "counted" as an available "resource" by the Department for the purposes of calculating Medicaid eligibility for the institutionalized spouse. But first, we must determine what is a "resource" under the Medicaid rules. This is an important starting point because the state department is required to determine the amount of "resources" of the institutionalized spouse at the time of the filing of the application for Medicaid benefits. 42 USC 1396r–5(c)(2).[9] And, as part of that process the Department must also calculate the amount of the "community spouse resource allowance". That allowance is calculated from "the total value of the resources to the extent either the institutionalized spouse or the community spouse has an ownership interest" as of a particular point in time (which is normally not the date of filing the application for Medicaid benefits). 42 USC 1396r–5(c)(1)(A)(1); emphasis added.

In order to determine what is a "resource," we need to first examine how the Medicaid statutes define the term as "resource". The term "resource" has a special meaning under the

[9] Note that "Asset eligibility exists when the asset group's countable assets are less than, or equal to, the applicable asset limit at least one day during the month being tested." See BEM 400, page 6 Appx 263a.

Medicaid laws, and when administering the Medicaid plan, the state may consider **only** such income and assets as are "available" to the applicant, as determined by the federal rules. See *Geston* at 874; and *Wisconsin Dept of Health and Family Services* at 495. Under those federal rules a "resource" is defined as follows:

> "(a) Resources; defined. For purposes of this subpart L, resources means cash or other liquid assets or any real or personal property that an individual (or spouse, if any) **owns and could convert to cash to be used for his or her support and maintenance**.
> (1) If the individual has the right, authority or power to liquidate the property or his or her share of the property, it is considered a resource. **If a property right cannot be liquidated, the property will not be considered a resource of the individual (or spouse).**

20 CFR 416.1201(a); (emphasis added).

Therefore, **as a general rule, assets of any kind are <u>not resources</u> if an individual does not have "the legal right, authority, or power to liquidate them."** When certain trusts are involved, this general rule is modified as to the "individual" Medicaid applicant by 42 USC 1396p(d)(3)(B), but not as to the "individual's spouse," because the "individual's spouse" is not included under that modified rule. This difference is discussed in more detail under Part III of this brief.

However, there are additional rules that apply to spouses as well.

> (4) Separate treatment of resources after eligibility for benefits established
> During the continuous period in which an institutionalized spouse is in an institution and **after the month in which an institutionalized spouse is determined to be eligible for benefits under this subchapter, no resources of the community spouse shall be deemed available to the institutionalized spouse**.
> 42 USC 1396r–5(c)(4); emphasis added.

That is, after the initial month for which the institutionalized spouse is determined to have qualified

[which will usually be the month of application per 42 USC 1396r–5(c)(2)], the resources of the community spouse are no longer deemed to be available to the institutional spouse, which means that resources of any type received by that community spouse after that initial month have absolutely no effect on the continued qualification of the institutionalized spouse. This applies to all types of assets, including distributions from trusts or annuities and income payments.

Further, both before or after qualification, during any month in which an institutionalized spouse is in the institution (subject to exceptions not applicable to this analysis), **"no income of the community spouse shall be deemed available to the institutionalized spouse"**. 42 USC 1396r–5(b)(1); emphasis added.

Also, with regard to income, in the case of a trust after eligibility has been determined, the federal statutes direct that income shall be considered available to each spouse as provided in the trust, or, in the absence of a specific provision in the trust, if payment of income is made solely to the institutionalized spouse or the community spouse, the income shall be considered available only to that respective spouse. 42 USC 1396r–5(b)(2)(B). In other words, when the trust specifies to whom distributions are to be made, those trust provisions control, and income payable to the community spouse is not countable as income to the institutionalized spouse.

B. When the Medicaid resource rules as set forth in the Medicaid statutes, including the correct interpretation of 42 USC 1396p(d)(3)(B) [see Part III of this Brief), are applied to the facts of these cases, the assets held under these Sole Benefit Trusts were not countable "resources" at the time these applications were filed.

When the above resource rules are applied to these Sole Benefit Trusts, none of the assets

of those trusts can be "counted" as an "available resource" to these Appellant/applicants as of the date each Medicaid application was filed because:

1. Each Sole Benefit Trust is irrevocable.

2. None of the Appellant/applicants are beneficiaries of their husband's Sole Benefit Trust, and therefore there are no circumstances under which a payment can be made from the trust to or for the benefit the wife/applicant. As outlined in detail under Part III of this Brief, the term "individual" as used in 42 USC 1396p(d)(3)(B) does not apply to the spouse of the applicant, and therefore, the "any circumstances rule" of that statute does not apply to these trusts.

3. At the time each application was filed, there was no payment or distribution that could be made to the husband/beneficiary.

4. The beneficiary of each trust was not the trustee, and the trusts do not authorize the beneficiary to distribute trust property to himself or liquidate any of the property of the trust and distribute that cash to himself, and as a result, the beneficiary/husband did not have the legal right, authority, or power to convert the trust assets to cash and then use that cash for his or her support and maintenance.

5. Since the determination of the amount of countable resources for an initial eligibility determination is to made "as of the time of application for benefits" (see 42 USC 1396r–5(c)(2), cited above), none of the assets of any of these trusts was an available "resource" to the applicant or the applicant's spouse.

Therefore, the Court of Appeals clearly erred when it ignored the various Medicaid resource rules and held that the assets of these Sole Benefit Trusts were countable to the wife/Medicaid applicant per the terms of 42 USC 1396p(d)(3)(B). See Part III of this Brief below for the detailed analysis of 42 USC 1396p(d)(3)(B).

III. THE COURT OF APPEALS HAS NOT PROPERLY INTERPRETED THE CONTROLLING FEDERAL STATUTE, 42 USC 1396p(d)(3)(B).

A. The Court of Appeals interpreted 42 USC 1396p(d)(3)(B) without taking into account the provisions of the rest of that section or related sections that bear on that interpretation.

We now return to the central issue in this case – whether the assets held under a community spouse's Sole Benefit Trust may be "counted" as an available "resource" to the couple. The answer to that question depends on the proper interpretation of the term "individual" as used in 42 USC 1396p(d)(3)(B) (and the corresponding term "person" as used in the related Michigan Bridges Eligibility Manual Item).[10] Neither the Department nor any court can properly determine the extent to which assets held in trust are "countable" for purposes of a Medicaid application unless it starts with the correct interpretation of the applicable statute. That federal statute sets forth the Medicaid rules to be used when evaluating how assets held under certain trusts are to be "counted" when a person is applying for "SSI-Related Medicaid"to assist with the payment of nursing home expenses.[11] That section reads as follows:

> B) In the case of an irrevocable trust—
> (i) if there are any circumstances under which payment from the trust could be made to or for the benefit of the **individual**, the portion of the corpus from which, or the income on the corpus from which, payment to the **individual** could be made shall be considered resources available to the **individual**, and payments from that portion of the corpus or income—
> (I) to or for the benefit of the **individual**, shall be considered income of the

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[10] See Michigan Bridges Eligibility Manual Item 401, Appx 325a.

[11]The Applicants in these cases applied for Medical Assistance (Medicaid) to assist with the payment of nursing home costs under the federal Medicaid system commonly referred to as "Title XIX". The category of Medical Assistance for which they applied is known in Michigan as "SSI-Related Medical Assistance." Title XIX is found at 42 USC 1396 et seq.

> **individual**, and
>
> (II) for any other purpose, shall be considered a transfer of assets by the **individual** subject to subsection (c) of this section; and
>
> (ii) any portion of the trust from which, or any income on the corpus from which, no payment could under any circumstances be made to the i**ndividual** shall be considered, as of the date of establishment of the trust (or, if later, the date on which payment to the individual was foreclosed) to be assets disposed by the **individual** for purposes of subsection (c) of this section, and the value of the trust shall be determined for purposes of such subsection by including the amount of any payments made from such portion of the trust after such date.

42 USC 1396p(d)(3)(B); emphasis added.

The meaning of the phrase "if there are any circumstances under which payment from the trust could be made to or for the benefit of the individual," as used in 42 USC 1396p(d)(3)(B), hinges on the meaning of the term "individual". The Court of Appeals has interpreted the term "individual" in this provision to mean "the individual or the individual's spouse" (although that section includes no such wording). However, when arriving at that conclusion, the Court of Appeals did not engage in any meaningful analysis of the rest of 42 USC 1396p to determine how the term "individual" is used in the context of that statute. Throughout that statute, whenever Congress intends to include the spouse of the "individual" who is applying for or receiving Medicaid, it says so specifically.

The Department has argued repeatedly in the briefs it filed below that **both** the SSI rules of 42 USC 1382b(e) as well as the Medicaid rules of 42 USC 1396p(d), apply to the determination of whether the assets of an irrevocable trust that designates the **applicant's spouse** as the beneficiary are to be counted as resources of the Medicaid applicant, even where the Medicaid applicant is not the beneficiary. The Department's argument is based on the fact that 42 USC 1382b(e) specifically includes the "**individual's spouse**" within its provisions.

However, federal law specifically states that the provisions of 42 USC 1382b(e) are **not applicable** to the Medicaid medical assistance program. 42 USC 1396a(a)(10)(G). In particular, 42 USC 1396a(a)(10)(G) reads as follows:

> "A State plan for medical assistance must -
> (10) provide -
> (G)that, in applying eligibility criteria of the supplemental security income program under subchapter XVI for purposes of determining eligibility for medical assistance under the State plan of an individual who is not receiving supplemental security income, **the State will disregard the provisions of subsections (c) and (e) of section 1382b of this title;**

(emphasis added).

Nevertheless, a comparison of 42 USC 1382b(e) to 42 USC 1396p(d) is helpful to aid in the interpretation of 42 USC 1396p(d). We begin with a review of the provisions of **42 USC 1396p(d)**, which reads as follows:

> (d) Treatment of trust amounts
> (1) For purposes of determining an **individual**'s eligibility for, or amount of, benefits under a State plan under this subchapter, subject to paragraph (4), the rules specified in paragraph (3) shall apply to a trust established by such **individual**.
> (2)
> (A) For purposes of this subsection, an **individual** shall be considered to have **established** a trust if assets of the **individual** were used to form all or part of the corpus of the trust and if any of the following individuals established such trust other than by will:
> (i) The **individual**.
> (ii) The **individual's spouse**.
> (iii) A person, including a court or administrative body, with legal authority to act in place of or on behalf of the individual or the **individual's spouse**.
> (iv) A person, including any court or administrative body, acting at the direction or upon the request of the individual or the **individual's spouse**.

42 USC 1396p(d); emphasis added.

The Court of Appeals relies in part on 42 USC 1396d(d)(2)(A)(i)-(ii) for its ruling that "The

Legislature has clearly indicated that an institutionalized individual's assets includes not only those that he or she has, but also those that his or her spouse has . . . and that remains true even when those assets are placed into a trust by the spouse". Court of Appeal opinion, citing 42 USC 1396d(d)(2)(A)(i)-(ii), Appx 189a. However, a careful review of this provision reveals that it says absolutely nothing about when trust assets are to be counted as resources – it only addresses who will "be considered to have established a trust" (and states "the rules specified in paragraph (3)" shall apply to such a trust).

But next we should look at 42 USC 1382b(e) to see how Congress worded that provision, which reads as follows:

> (e) Trusts
>
> (1) In determining the resources of an **individual**, paragraph (3) shall apply to a trust (other than a trust described in paragraph (5)) established by the **individual**.
>
> (2)
>
> (A) For purposes of this subsection, an **individual** shall be considered to have **established** a trust if any assets of the **individual** (or of the **individual's spouse**) are transferred to the trust other than by will.
>
> (B) In the case of an irrevocable trust to which are transferred the assets of an **individual** (or of the **individual's spouse**) and the assets of any other person, this subsection shall apply to the portion of the trust attributable to the assets of the **individual** (or of the **individual's spouse**).

42 USC 1382b(e); (emphasis added).

These two provisions are obviously very, very similar, although not identical. However, one thing is clear, 42 USC 1396p(d) which deals with determining a Medicaid **applicant's** eligibility for Medicaid refers to that person as the "**individual**." The other thing that is clear from a review of both of these sections is that when Congress intends to refer to the Medicaid applicant's **spouse**, it

does so specifically and refers to that spouse as the "**individual's spouse**". Also, under either provision, the individual who has applied for Medicaid is considered as having created the Trust, but that provision does not tell us when to count trust assets as a "resource," so we must still examine the rest of 42 USC 1396p(d) to find out those rules.

Now, returning to 42 USC 1396p(d)(3)(B), that provision goes on to provide:

> B) In the case of an irrevocable trust—
>
> (i) if there are any circumstances under which payment from the trust could be made to or for the benefit of the **individual**, the portion of the corpus from which, or the income on the corpus from which, payment **to the individual** could be made shall be considered resources available to the **individual**, and payments from that portion of the corpus or income—
>
> (I) to or for the benefit of the **individual**, shall be considered income of the **individual**, and
>
> (II) for any other purpose, shall be considered a transfer of assets by the **individual** subject to subsection (c) of this section; and
>
> (ii) any portion of the trust from which, or any income on the corpus from which, no payment could under any circumstances be made to the **individual** shall be considered, as of the date of establishment of the trust (or, if later, the date on which payment to the individual was foreclosed) to be assets disposed by the **individual** for purposes of subsection (c) of this section, and the value of the trust shall be determined for purposes of such subsection by including the amount of any payments made from such portion of the trust after such date.

42 USC 1396p(d)(3)(B); emphasis added.

This provision deals specifically with when the "resources" held under a trust are to considered "available" to the individual, and the tells us that if "there are any circumstances under which payment from the trust could be made to or for the benefit of *the **individual***" the portion from which the payment could be made will "be considered resources available to *the **individual*** . . . ." (Emphasis added). This is sometimes referred to as the "Any Circumstances Rule". But who is this "individual"? The earlier part of this same statute section refers to the "individual" and the

"individual's spouse" separately. At no place in 42 USC 1396p(d)(3)(B) is the "individual's spouse" mentioned, although the "individual's spouse" is mentioned in other parts of 42 USC 1396p(d).

On the other hand, 42 USC 1382b(e)(3)(B) provides:

> (B) In the case of an irrevocable trust established by an **individual**, if there are any circumstances under which payment from the trust could be made to or for the benefit of the **individual** (**or of the individual's spouse**), the portion of the corpus from which payment to or for the benefit of the **individual** (or of the **individual's spouse**) could be made shall be considered a resource available to the **individual**.

Emphasis added.

So, we can again see that if Congress wants to include the "**individual's spouse**" within this resource availability rule for trusts, it says so specifically. For programs under 42 USC 1396p (Title XIX Medicaid), Congress specifically has stated that the rules shown in 42 USC 1382b(e) do **not** apply, and Congress specifically did not include the **individual's spouse** within the provisions of 42 USC 1396p(d)(3)(B). There is no mention of the **individual's spouse** in this provision, although the "individual's spouse" is mentioned in other parts of 42 USC 1396p(d). The provisions of 42 USC 1396p(d)(2) which deal with determining who established or funded the trust is a completely different question from determining whether assets are available to *the individual* identified under 42 USC 1396p(d)(3)(B)(I). Furthermore, past Congressional action demonstrates that the spouse is **not** to be included under the Any Circumstances Rule of 42 USC 1396p(d)(3)(B)(I). Here is why:

1. OBRA 93 added Subsection (d) to 42 USC 1396p, including Paragraph (d)(3).[12]

[12]Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66 § 13611(b), 107 Stat. 312, 624.

2. 42 USC 1396a(r)(2) and State Medicaid Manual 3257(B)(4) instruct states to use generally the Title XVI (SSI) definition of assets for Title XIX (Medicaid) purposes.

3. Six years after OBRA 93, Congress enacted the Foster Care Independence Act of 1999 ("Foster Care Act"). Foster Care Independence Act of 1999, Pub. L. No. 106-169 § 205(a), 113 Stat. 1822, 1833. Section 205(a) of the Foster Care Act added trust provisions to the SSI resource provisions of 42 USC 1382b. Subsection (e)(3)(B) of 42 USC 1382b tracks the Any Circumstances Test of OBRA 93 which applies to Medicaid recipients, **with one very important exception**:

> In the case of an irrevocable trust established by an individual, if there are any circumstances under which payment from the trust could be made to or for the benefit of the individual *(or of the individual's spouse)*, the portion of the corpus from which payment to or for the benefit of the individual *(or of the individual's spouse)* could be made shall be considered a resource available to the individual.

(Emphasis added to highlight additions made by Foster Care Act applicable to the SSI program)

4. Because the Medicaid resource rules generally track the SSI rules, the 1999 addition of 42 USC 1382b(e)(3)(B) would set up a conflict between the SSI version of the Any Circumstances Test (spouses included) and the Medicaid version (individuals only, spouses not mentioned) unless Congress took some clarifying action.

5. Congress could have simply amended the Medicaid version which is at issue in this appeal [42 USC 1396p(d)(3)(B)(i)] to correspond with the new SSI version. But Congress did not

do so. Rather, the same section of the Foster Care Act (paragraph 205(b)(3)) added the following to the Medicaid asset provisions of 42 USC 1396a(10)(G):

> that, in applying eligibility criteria of the supplemental security income program under subchapter XVI of this chapter for purposes of determining eligibility for medical assistance under the State plan of an individual who is not receiving supplemental security income, *the State will disregard the provisions of subsections (c) and (e) of section 1382b of this title . . . .*

(Emphasis added).[13]

From this review, it can be seen that Congress clearly had no intention of applying the Any Circumstances Rule of 42 USC 1396p(d)(3)(B) to the **spouse** of a Medicaid applicant, because it specifically directed the states not to do so in 42 USC 1396a(10)(G).

Elementary statutory construction dictates that a court is not to add provisions to a statute that the legislative body did not include. The fact that Congress expressly rejected the trust standard of 1382b(e) means that there can be no question that Congress expressly rejected application of the Any Circumstances Rule of 42 USC 1396p(d)(3)(B) to the **spouse** of a Medicaid applicant. This is conclusive evidence that the Any Circumstance Test does not apply to trusts that can distribute only to the **spouse** of a Medicaid applicant, and the Court of Appeals ruling to the contrary is erroneous. Where the evidence is clear that Congress "expressly declined to enact" a provision, the court cannot find that Congress sub silentio intended to include the provision:

> "Few principles of statutory construction are more compelling than the proposition that Congress does not intend sub silentio to enact statutory language that it has earlier discarded in favor of other language." *Nachman Corp v Pension Benefit Guaranty Corporation*, 446 U S 359, 392-393 (1980) (Stewart, J., dissenting); cf.

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[13]The reference to 1382b(c) was actually added after the Deficit Reduction Act of 2005 to decouple the new 60 month look back from the existing SSI look back of 36 months

Gulf Oil Corp v Copp Paving Co, 419 US 186, 200 (1974); *Russello v United States*, 464 US, at 23.

INS v Cardoza-Fonseca, 480 US 421, 442-443, (1987).

It is undisputed that **the Medicaid applicant** in each of these three cases can receive **no distribution** from the Sole Benefit Trusts at issue, because those applicants are not a beneficiary of their husband's Trust. Therefore, 42 USC 1396p(d)(3)(B) does not cause the assets of any of these Sole Benefit Trusts, **which are not payable to the "individual" Medicaid applicant at any time**, to be "considered a resource available to" that individual Medicaid applicant. In other words, under the provisions of 1396p(d)(3)(B), the sole benefit trust "established" for the spouse (which by the definition of "sole benefit" cannot distribute to the individual Medicaid applicant), is not tested by the Any Circumstance Test of 42 USC 1396p(d)(3)(B). Each of these Trusts is akin to an annuity which makes payments to the husband of each Medicaid applicant, and whether such "assets" are "countable" as a a "resource" which is "available" to the spouse is determined under the general Medicaid rules for determining when something is a countable "resource". The Court of Appeals decision clearly failed to properly analyze and interpret 42 USC 1396p(d)(3)(B) and therefore that decision, and the corresponding underlying Department determination, must be reversed as contrary to the federal law requirements.

B. The Court of Appeals' basis for interpreting Congress intent does not support its conclusions.

The Court of Appeals cites 42 USC 1396p(h)(1) as support for its conclusion that "The Legislature has clearly indicated that an institutionalized individual's assets includes not only those

that he or she has, but also those that his or her spouse has". The Court of Appeals arrives at that this blanket announcement, by completely ignoring the rest of 42 USC 1396p(h) (as well as the fact that not all "assets" are actually "countable" resources). Section 42 USC 1396p(h) reads in full as follows:

> (h) Definitions
> In this section, the following definitions shall apply:
> (h)(1) The term "assets", with respect to an individual, includes all income and ***resources*** of the individual and of the individual's spouse, including any income or ***resources*** which the individual or such individual's spouse is entitled to but does not receive because of action--
> (A) by the individual or such individual's spouse,
> (B) by a person, including a court or administrative body, with legal authority to act in place of or on behalf of the individual or such individual's spouse, or
> (C) by any person, including any court or administrative body, acting at the direction or upon the request of the individual or such individual's spouse.
> (h)(2) The term "income" has the meaning given such term in section 1382a of this title.
> (h)(3) The term "institutionalized individual" means an individual who is an inpatient in a nursing facility, who is an inpatient in a medical institution and with respect to whom payment is made based on a level of care provided in a nursing facility, or who is described in section 1396a(a)(10)(A)(ii)(VI) of this title.
> (h)(4) The term "noninstitutionalized individual" means an individual receiving any of the services specified in subsection (c)(1)(C)(ii) of this section.
> (h)(5) The term "***resources***" has the meaning given such term in section **1382b** of this title, without regard (in the case of an institutionalized individual) to the exclusion described in subsection (a)(1) of such section.

(Emphasis added).

Clearly, whether something is an **"resource"** must be determined at least in part by reference to the provisions of 42 USC 1382b – which the Court of Appeals completely ignored when making its sweeping statement of Congressional intent. The opening paragraphs of 42 USC 1382b(a) contain a **lengthy list of "assets" which are excluded from the definition of "resources,"** which

belies the Court of Appeals unlimited conclusion as to Congress' intent that all assets must be considered.

The Court of Appeals also cites 42 USC 1396r-5(c)(2), as one of the "plethora" of federal statutory provisions that support its view that these "trusts" assets, despite being for the sole benefit of the husbands according to the trusts' language, were correctly determined to be countable assets for purposes of the plaintiffs' Medicaid eligibility". See Appx 188a. As with the rest of the analysis by the Court of Appeals, it ignores the other applicable provisions of federal Medicaid law. The section cited by the Court of Appeals reads in part as follows:

> (A) except as provided in subparagraph (B), all the **resources** held by either the institutionalized spouse, community spouse, or both, shall be considered to be available to the institutionalized spouse, and . . .

See Appx 188a.

So, says the Court of Appeals, this section means that the sole benefit trust assets payable at some point in the future to the spouse of the individual applicant are necessarily "attributed" to the individual applicant, and therefore countable assets. But the cited section says nothing about trusts at all, it talks about "**resources**". Nor does it say anything about how an asset is determined to be a **"resource"**. Rather, 42 USC 1396r-5(a)(3) specifically states:

> Except as this section specifically provides, **this section does <u>not</u> apply to**--
>
> > (A) **the determination of what constitutes income or resources**, or
> > (B) the methodology and standards for determining and evaluating income and resources.
>
> [emphasis added]

That is, 42 USC 1396r-5 does not contain anything about how a determination is made as

to "**what constitutes income or resources**" except to reiterate that

> In this section, the term "resources" does not include--
>
> > (A) resources excluded under subsection (a) or (d) of section 1382b of this title, and
> >
> > (B) resources that would be excluded under section 1382b(a)(2)(A) of this title but for the limitation on total value described in such section.

42 USC 1396r-5(c).

Therefore, the provisions of 42 USC 1396r-5 do not at all address how or when the assets held under a trust are to be counted as "resources".

The Court of Appeals also completely ignored the requirement that the state may only consider such income and assets as are "available," as determined by the federal rules. *Geston* at 874 (DND 2012); and *Wisconsin Dept of Health and Family Services* at 495. As discussed in Part II of this brief, **as a general rule, assets of any kind are <u>not resources</u> if an individual does not have "the legal right, authority, or power to liquidate them."** This rule is modified as to the "individual" Medicaid applicant by 42 USC 1396p(d)(3)(B), but not as to the "individual's spouse," because the "individual's spouse" is not included under that rule.

Further, The Medicare Catastrophic Coverage Act of 1988 directs that in determining Medicaid eligibility, state agencies must use criteria that are "'no more restrictive' than the eligibility requirements under the Supplemental Security Income (SSI) Act." *Houghton ex rel Houghton v Reinertson*, 382 F3d 1162, 1170 (10th Cir 2004), (quoting 42 USC 1396a(r)(2)(A)); also see 42 USC 1396a(a)(10)(C)(I); 42 USC 1396a(r)(2)(B), and *Lopes v Dep't of Soc Servs*, 696 F3d 180, 182-83 (2d Cir 2012) (noting the same directive in 42 USC 1396a(a)(10)(C)(i)); *James v Richman*, 547 F3d 214, 218 (3d Cir 2008) (same). Also see 42 CFR 435.601(d)(4).

In summary, Congress' use of the term "individual" in 42 USC 1396p(d) has a particular meaning as used in the Medicaid statutes and is intended to and in fact means the "Medicaid applicant" and does not "sub silento" include the spouse of the Medicaid applicant. When declaring Congress' intent, the Court of Appeals has completely ignored the actual wording of 42 USC 1396p which sets forth the various Medicaid rules that discuss how to determine what is or is not a "resource" and also without reviewing the various Medicaid statute provisions which set forth the rules for when assets (or "resources") are or are not "countable" for the Medicaid applicant.

IV. THE COURT OF APPEALS ERRED BY NOT FINDING THAT THE DEPARTMENT EXCEEDED ITS AUTHORITY WHEN IT MADE ITS POLICY INTERPRETATION CHANGE RETROACTIVELY APPLICABLE TO APPELLANTS' PREVIOUSLY FILED MEDICAID APPLICATIONS.

When Appellants submitted their respective applications, the Department's consistent policy interpretation for well over a decade was that spouse sole benefit trusts of the type used here were not countable assets. See Appx 94a. Ms. Shrauben (the legal analyst assigned by the Department to evaluate this SBO trust) testified that the interpretation of BEM 401 which she applied to Sole Benefit Trusts was not being used until mid-August 2014, starting August 13th, but all of Medicaid applications filed in this case were before that date. See Appx 94a, 58a, 59a, and 156a. Ms. Shrauben also acknowledged that the policy interpretation which had been used prior to August 13, 2014, was that the assets of a Sole Benefit Trust such as these were non-countable. *Id.*

The Department argued that its new interpretation of the treatment of SBO Trusts was merely being "clarified" and that the change was required in order to comply with Federal mandates, and the Court of Appeals agreed. However, this is pure speculation, as no ruling, letter, memorandum,

or otherwise from CMS substantiates this claim. The Court of Appeals decision then states that while the Appellants and amicus "cite to cases involving the retroactive application of benefits in somewhat similar scenarios, it appears that those cases generally involve situations where a person was denied benefits that they were entitled to, not situations where a person was denied benefits that they were not entitled to." The Court of Appeal's reasoning has no legal basis.

A. The DHHS Violated the Due Process Clause of the Fourteenth Amendment to the United States Constitution and Article 1, § 17 of the Michigan Constitution By Not Providing Appellants with Timely and Reasonable Notice of its Change in the Interpretation of Medicaid Eligibility Provisions.

The Due Process Clauses of the Fourteenth Amendment to the U.S. Constitution and Article I, § 17 of the Michigan Constitution provide that the state shall not deprive a person of life, liberty, or property without due process of law. *In re Estate of Keyes,* 310 Mich App 266, 274 (2015), citing *Elba Twp* v *Gratiot* Co *Drain Comm'r,* 493 Mich 265, 288 (2013). When a protected property interest is at stake, the Due Process Clause generally requires notice and an opportunity to be heard. *In re Estate of Keyes, supra,* citing *Hinky Dinky Supermarket, Inc* v *Dep't of Community Health,* 261 Mich App 604, 606 (2004). Specifically, the Due Process of the Fourteenth Amendment requires that the State provide applicants for Medicaid with due process protections See *Goldberg* v *Kelly,* 397 US 254 (1970).

As the analytical point of departure, it is important to underscore that an essential part of the due process guarantee of an "opportunity to be heard" is the corollary promise of reasonably sufficient notice. See *Mathews* v *Eldridge,* 424 US 319, 325 n 4 (1976) (summarizing the due process factors set forth in *Goldberg);* 4 Wright & Miller, *Federal Practice and Procedure,* § 1074

at 456 (2d ed. 1987) (stating that the "requirement of reasonable notice must be regarded as part of due process"). Rudimentary due process protection includes timely and reasonably sufficient notice. *Goldberg, supra,* 397 US at 267 (holding that "timely and adequate notice" is required). To satisfy the due process requirements stated in *Mullane* v *Central Hanover Bank & Trust Co,* 339 US 306, 314 (1950), notice must be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."

Accordingly, the Department must comply with the procedural due process protections provided by the Fourteenth Amendment to the U.S. Constitution and Article 1, § 17 of the 1963 Michigan Constitution. See *Dow* v *State,* 396 Mich 192, 202 (1976) ("The Due Process Clause is a limitation on state action."). For the purpose of rational life and estate planning, timely and reasonably sufficient notice regarding the treatment of SBO trusts and the manner and scope of what assets are non-countable for purposes of the Medicaid program is necessary at the time of enrollment in the Medicaid program in order to permit individuals to consider their planning options on an informed basis so as to preserve the bounty of their lives and protect their constitutionally protected rights to dispose of one's property, to the extent permitted by law. *Id.* at 204 (stating that "the actual owner * * * of real estate, chattels or money" has "property interests protected by procedural due process") (citing *Bd of Regents* v *Roth,* 408 US 564 (1972)). Clearly, timely and reasonably sufficient notice of the actual conditions and requirements of the Medicaid program are essential at the time of enrollment in order to allow Medicaid applicants to make informed decisions before deciding to enter the Medicaid program in the first place. This is not because Appellants are trying to evade those federally mandated asset limits. Rather, it is simply that the Appellants sought to preserve their assets as non-countable through a long-accepted SBO trust, to the extent provided by

Medicaid law and regulations in force at the time of the Appellants' Medicaid application were filed.

In this case, the Department changed its interpretation of longstanding law and policy, implementing a new Medicaid eligibility policy, without any advance public notice to Appellants (or other individuals whose Medicaid applications were pending) before their Medicaid application were submitted to the Department. As a result, the Appellants and their respective husbands were prevented from adjusting their planning strategies at the time of the Appellants' Medicaid application in order to allow them to qualify for Medicaid assistance (e.g., a promissory note loan or annuity), while also allowing the community spouses to retain their own property, to the extent allowed under Medicaid law and regulations. However, by making an unannounced change in its interpretation of the Medicaid eligibility policy without providing reasonable and timely notice to the Appellants, the Department violated the Due Process Clause of the Fourteenth Amendment and Article I, § 17 of the Michigan Constitution since the Department was required to give timely and reasonably sufficient public notice of the change of manner it would be applying federal Medicaid law to the treatment of the assets in SBO trusts.

B. The Department is not permitted to retroactively change its interpretation that the assets of a Sole Benefit Trust are countable.

Appellants demonstrated substantial reliance on the Department's prior policy interpretation when they submitted their applications that included the respective spouse's sole benefit trust, which was not a countable asset under the Department's policy interpretation which was in effect at the time each application was submitted. While an administrative agency has the authority to change its interpretation of the law it is administering, it is severely restricted from doing so retroactively.

In a case involving imposition of inheritance tax to those who inherited the annual installment of a lottery prize, this Court held that the agency could not retroactively apply its new interpretation of the tax law, but rather was bound by its prior construction. Where for over a decade the agency had interpreted the Lottery Act as exempting prizes from the tax, this Court in *D'Amico* observed:

> "It has been held that an administrative agency having interpretive authority may reverse its interpretation of a statute, but that its new interpretation applies only prospectively." Sands, supra, Sec. 49.05, p. 365

In re D'Amico Estate, 435 Mich 551, 460 NW2d 198, 203 (1990).

D'Amico is controlling authority in these cases of benefit applicants. Its holding is not limited to those who had the right to lottery payments. The court held the agency had a duty not only to those who won the lottery but to all who "purchased lottery tickets before September 14, 1983." *Id* at 564. It is beyond question that Appellants here, who applied for assistance with significant nursing home expenses and who arranged their affairs in substantial reliance on longstanding Department policy, had much more investment and expectation than somebody who merely applied "pocket change" to purchase a lottery ticket.

Moreover, retroactive application of an administrative rule that changes settled interpretation of law is strongly disfavored:

> Retroactivity is not favored in the law. Thus, congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result. By the same principle, a **statutory grant of legislative rulemaking authority will not, as a general matter, be understood to encompass the power to promulgate retroactive rules unless that power is conveyed by Congress in express terms**. See *Brimstone R Co v U S*, 276 US 104, 122 (1928) ("The power to require readjustments for the past is drastic. It . . . ought not to be extended so as to permit unreasonably harsh action without very plain words"). Even

> where some substantial justification for retroactive rulemaking is presented, courts should be reluctant to find such authority absent an express statutory grant. (citations omitted).

Bowen v Georgetown Univ Hospital, 488 US 204, 208-209 (1988); emphasis added.

In his concurrence Justice Scalia underscored the requirement that a rule be of prospective effect by quoting from the authoritative manual on administrative law, the *Attorney General's Manual on the Administrative Procedure Act*:

> Of particular importance is the fact that `rule' includes agency statements not only of general applicability but also those of particular applicability applying either to a class or to a single person. In either case, they must be of *future effect*, implementing or prescribing future law.
> .....
> "[T]he entire Act is based upon a dichotomy between rule making and adjudication. . . . Rule making is agency action which regulates the future conduct of either groups of persons or a single person; it is essentially legislative in nature, not only because it operates in the future but also because it is primarily concerned with policy considerations. . . . Conversely, adjudication is concerned with the determination of past and present rights and liabilities.

Id. at 218-219.

Retroactive application of a rule is especially erroneous when applied to persons who have substantially relied upon the prior construction. *Martin v Dep't of Corrections*, 168 Mich App 647, 425 NW 2d 205 (1988) ("the general reliance upon the old rule" is a factor against retroactivity). See also *Northern Pipeline Constr Co v Marathon Pipe Line Co*, 458 US 50, 87-88 (1982), (retroactivity not favored where the "retroactive application 'could produce substantial inequitable results' in individual cases"); *MetWest Inc v Secretary of Labor*, 560 F3d 506, 511 (DC Circuit 2009) (an authoritative departmental interpretation could not be changed without notice and comment where the parties showed "substantial and justifiable reliance on a well-established agency interpretation.").

Michigan courts will look to federal decisions in resolving questions of retroactivity of decisions. *Pike v City of Wyoming*, 431 Mich 589, 603-604; 433 NW 2d 768 (1988). It is settled in federal administrative law that an administrative rule is impermissibly retroactive where the persons affected show substantial and detrimental reliance on an agency's rules. It is also settled that when an agency fails to consider the "serious reliance interests" its prior policy engendered its actions may be characterized as "arbitrary."

> The AP A contains a variety of constraints on agency decision making - the arbitrary and capricious standard being among the most notable. As we held in Fox Television Stations, and underscore again today, the APA requires an agency to provide more substantial justification when "its new policy rests upon factual findings that contradict those which underlay its prior policy; or when its prior policy has engendered serious reliance interests that must be taken into account. It would be arbitrary and capricious to ignore such matters." 556 U.S., at 515, 129 S.Ct. 1800 (citation omitted); See also id., at 535, 129 S.Ct. 1800 (KENNEDY, J., concurring in part and concurring in judgment)"

*Perez v Mortgage Bankers Ass'n,*135 S Ct 1199, 1209 (2015).

Where as here an agency has consistently and clearly stated its policy, retroactively changing that which has been settled for over a decade is an arbitrary act of administrative power:

> In this case, we might well conclude that where for fifteen years the Board considered conditional negotiation consistent with the statutory design **the ill effect of the retroactive application of a new standard so far outweighs any demonstrated need for immediate application to past conduct . . . as to render the action "arbitrary"**.

NLRB v Majestic Weaving Co, 355 F2d 854, 859-861 (2d Cir 1966); emphasis added.

There is no dispute that the Department dramatically changed its prior policy interpretation that had been in place for well over a decade. Before that change was put into place by the Department starting on August 13, 2014, the Department did not "count" assets held under a spouse

sole benefit trust under the circumstances presented by these cases. However, apparently effective August 13, 2014, the Department completely changed that interpretation and viewed such assets as completely countable. That interpretation change should not have been applied to applications filed before the Department made that change, and by doing so, the Department violated the rules set forth above and exceeded its statutory authority. Such an action was properly subject to reversal by the Circuit Court because it has: violated the constitution or a statute, exceeded the agency's authority or jurisdiction, was made upon unlawful procedure, is not supported by competent, material, or substantial evidence, is arbitrary or capricious, or an abuse of discretion, and/or was the result of a substantial or material error of law.

It is beyond argument that Appellants substantially and reasonably relied on the Department's long standing policy of not treating SBO Trusts as available resources. Under no conceivable tenet of administrative law can the Department justify applying its new interpretation of the law to those applicants who had irrevocably transferred assets to sole benefit trusts and applied before its change in interpretation.

CONCLUSION AND RELIEF REQUESTED

When the correct Federal law and regulations are properly applied to the facts of this case, as well as the policy found in the federal manuals, the assets held under the Irrevocable Sole Benefit Trust of each Appellant's husband at the time each Appellant's Medicaid application was filed were not countable resources for purposes of determining each Appellant's eligibility for the Medicaid program. The Circuit Courts in each case correctly concluded that the assets held under each Sole Benefit Trust were not countable under federal law at the time each Appellant's Medicaid application

was filed, and therefore each Appellant was qualified for Medicaid.

In addition, the Appellee's retroactive use of its new BEM 401 policy interpretation to the processing of Appellants' Medicaid applications was improper, arbitrary and a violation of the Due Process Clause of the Fourteenth Amendment and Article I, § 17 of the Michigan Constitution, because each of the applications had been filed prior to the adoption of this interpretation change and without any notice of such change. Under the Appellee's prior policy interpretation (which was in place at the time each Appellant's Medicaid application was filed), the assets held under the Sole Benefit Trust were not countable, and therefore each Appellant qualified for Medicaid under that prior policy interpretation .

Therefore, the Circuit Courts correctly concluded that pursuant to federal law, and also pursuant to the Department's policy interpretation which was in place at the time each Appellant's Medicaid application was filed, the assets held under each Sole Benefit Trust were not countable at the time each Appellant's Medicaid application was filed, and each Appellant therefore qualified for Medicaid coverage.

Wherefore, Appellant respectfully requests that this Court rule that the term "individual" as used in the current version of 42 USC 1396p(d)(3)(B) means the Medicaid applicant only (and does not include the Medicaid applicant's spouse), and the term "person" as used in the corresponding provisions of its BEM 401 means the Medicaid applicant only (and does not include the Medicaid applicant's spouse), to the processing of these applicant's Medicaid applications or any other Medicaid applications.

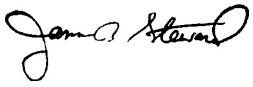
Further, Appellants also respectfully requests that this Court affirm the Circuit Court decisions, and reverse and vacate the Court of Appeal's opinion dated June 1, 2017, which was

approved for publication on July 27, 2017, and direct the Department to qualify these Appellants for Medicaid based on the applications which they previously filed with the Department and then issue notices to each Appellant accordingly.

Further, Appellant also respectfully requests that this Court enjoin the Department from in any manner interpreting the term "individual" as used in the current version of 42 USC 1396p(d)(3)(B) to mean anyone other than the Medicaid applicant, or in any manner interpreting the term "person" as used in the corresponding provisions of its BEM 401 to mean anyone other than the Medicaid applicant, in connection with the processing of these Appellants' Medicaid applications or any other applicant's Medicaid application.

RESPECTFULLY SUBMITTED,

STEWARD & SHERIDAN, P.L.C.



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